

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 205/MP/2021

Subject : Petition for recovery of additional expenditure incurred due to ash transportation charges consequent to Ministry of Environment, Forest & Climate Change, Government of India Notification dated 3.11.2009 and notification dated 25.1.2016 on a recurring basis.

Petitioner : NTPC Ltd

Respondents : UPPCL & 37 ors

Date of Hearing : **7.7.2022**

Coram : Shri I.S Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member

Parties present : Shri Venkatesh, Advocate, NTPC
Shri Ashutosh K. Srivastava, Advocate, NTPC
Shri Jatin Ghuliani, Advocate, NTPC
Shri Abhishek Nangia, Advocate, NTPC
Shri Anand Sagar Pandey, NTPC
Shri Manoj Kumar, NTPC
Shri Buddy A. Ranganadhan, Advocate, BPRL & MSEDCL
Shri Anupam Varma, Advocate, BPRL
Shri Rahul Kinra, Advocate, BPRL
Shri Aditya Ajay, Advocate, BPRL
Ms. Megha Bajpeyi, BPRL
Shri Aashish A. Bernard, Advocate, MPPMCL
Shri Anurag Naik, MPPMCL
Shri S. Vallinayagam, Advocate, TANGEDCO
Ms. B. Rajeswari, TANGEDCO
Ms. R. Ramalakshmi, TANGEDCO
Ms. R. Alamelu, TANGEDCO
Shri P.V. Dinesh, Advocate, KSEBL
Shri Shashwat Kumar, Advocate, BSPHCL
Shri Rahul Chouhan, Advocate, BSPHCL
Shri R.K. Mehta, Advocate, GRIDCO
Ms. Himanshi Andley, Advocate, GRIDCO
Shri Durga M Sahoo, GRIDCO
Shri Mahfooz Alam, GRIDCO
Shri Arunav Patnaik, Advocate, Karantaka Discoms
Ms. Bhabna Das, Advocate, Karnataka Discoms
Shri Anup Jain, Advocate, MSEDCL
Shri Akash Goel, Advocate, MSEDCL
Shri D.H. Agarwal, MSEDCL
Shri B.K. Saxena, UPPCL



Record of Proceedings

Due to paucity of time, the petition could not be taken up for hearing on 5.7.2022. However, the petition was taken up on 7.7.2022 through virtual hearing.

2. During the hearing, the learned counsel for the Petitioner circulated note for arguments and mainly submitted as under:

(a) The reliefs sought by the Petitioner in the present petition is (i) within the contours of law (ii) not in derogation of the regulations notified by this Commission and (iii) the Commission has the powers to grant the said reliefs.

(b) The Commission vide its order date 5.11.2018 in Petition No.172/MP/2016 has recognized the MOEF, GOI Notification dated 25.1.2016 as a 'change in law' event and allowed the recovery of fly ash transportation charges on account of such event, on prudence check, during the 2014-19 tariff period.

(c) The Petitioner had originally claimed the expenditure for ash transportation for 2019-20 and 2020-21 in the tariff petitions filed for the 2019-24 tariff period. However due to pendency on account of Covid-19 pandemic, the Petitioner was facing severe under recovery of the expenditure and therefore, the present petition was filed in October, 2021, seeking reimbursement of the expenditure incurred during 2019-20 and 2020-21 and for the balance period, the recovery of such expenditure to be permitted on a monthly basis. The Commission in some of its orders related to the tariff petitions filed for the 2019-24 tariff period, has held that the reimbursement of charges towards fly ash transportation, shall be governed by the decision of the Commission in the present petition.

(d) The Commission in its order dated 28.5.2022, has held that the present petition is maintainable. The expenses on account of ash transportation being of recurring nature, has increased, on a year-to-year basis and has caused cash-flow problems to the Petitioner. The MoEF&CC, GOI Notification on 31.12.2021 categorically prescribed that the expenditure incurred for meeting 100% Fly Ash Utilization shall be considered as 'Change in Law'.

(e) The submission of the Respondent BSPHCL that the tariff regulations notified by this Commission, do not permit the recovery of such expenditure, was considered at length and rejected by this Commission in para 23 of the order dated 28.5.2022. Similarly, the argument of the Respondents (TANGEDCO and BRPL) that fly ash utilisation is the sole responsibility of the Petitioner and since the Petitioner has defaulted in meeting such obligations (as per MOEF & CC notifications), the beneficiaries should not be saddled with the liability was also considered and rejected in the said order dated 28.5.2022;

(f) After filing of the petition, the Petitioner has incurred a total expenditure of Rs 1440 crore during 2021-22. As on date, the total expenditure incurred by the Petitioner is Rs. 3092 crores up to 31.3.2022. and continues to incur expenditure on fly ash transportation, on a month on month basis. The gravity of the situation compelling the Petitioner to file the present petition has been accepted by this Commission in paras 26 and 28 of the order dated 28.5.2022;



(g) Though the 2014 Tariff Regulations did not provide for a mechanism to permit the recovery of fly ash transportation expenses as 'change in law', the Commission, after considering the difficulty faced by the Petitioner and in exercise of the regulatory power under section 79(1)(a) of the Act, had granted relief to the Petitioner for recovery of such expenditure as additional O&M expenses. (*judgment dated 15.3.2020 of the Hon'ble Supreme Court in PTC Ltd. vs. CERC was referred to*). As the 2019 Tariff Regulations also do not deal with recovery of the said expenditure, this Commission, in exercise of the power under section 79 (1)(a) can grant relief to the Petitioner, which is otherwise not envisaged under the Regulations, following the principles enshrined under section 61 of the Act.

(g) The mechanism for monthly recovery of fly ash expenditure with annual reconciliation, put in place by the Commission in its order dated 22.3.2021 in Petition No. 405/MP/2019 (GKEL & anr v DHBVNL & ors) may be adopted in the present case of the Petitioner.

3. The representative of the Respondent UPPCL referred to its reply and pointed out that the Commission in its order dated 2.9.2021 in Petition No. 300/GT/2020 (tariff of Unchahar Thermal Power Station of the Petitioner) had not considered the fly ash transportation expenses as part of the O&M expenses. He submitted that the same may be adopted in the present case, by allowing the recovery of fly ash transportation expenses, on an annual basis (instead of monthly basis) after adjusting the sale proceeds of fly ash. The representative also sought permission of the Commission, to file its written submissions in the matter.

4. The learned counsel for Respondent GRIDCO argued that the reliefs claimed by the Petitioner are not admissible and mainly submitted as under:

(a) The prayer of the Petitioner for monthly recovery for fly ash transportation expenses was considered and rejected by this Commission in its order dated 5.11.2018 in Petition No. 172/MP/2016. The procedure and methodology for recovery of fly ash transportation expenses, is subject to prudence check of the information, only in a tariff petition in respect of each generating station, and not in the present petition.

(b) The Commission vide its order dated 5.11.2018 in Petition No.172/MP/2016 had permitted the recovery of fly ash transportation expenses, in exercise of the regulatory power, for the 2014-19 tariff period. Despite this, the Commission, did not provide for any regulation/provision, for recovery of fly ash transportation expenditure, under the 2019 Tariff Regulations;

(c) The exercise of the 'power to relax' and 'power to remove difficulty' by this Commission, cannot be contrary to the Regulations (*judgment of the Hon'ble Supreme Court in M.U.Sinai v UOI & ors was referred to*).

(d) The Petitioner has failed to satisfy the conditions mentioned in order dated 5.11.2018 in Petition No.172/MP/2016 and therefore, no prudence check can be carried out. No steps have been taken by the Petitioner to comply with the MOEF &CC Notifications relating to the period from 1999 to 2016. In case



100% fly ash utilization is achieved in terms of the said notifications, no expenses would have been incurred towards fly ash transportation.

(e) The issue of consumers being burdened with carrying cost is misplaced and would arise only when the principal amount is admitted in terms of compliance to the MOEF&CC Notifications by the Petitioner;

(h) The Commission in its order dated 14.8.2021 in Petition No. 161/MP/2020 had not allowed the recovery of fly ash transportation charges for non-compliance of the conditions. Also, the monthly recovery of fly ash transportation expenses (with annual reconciliation) as allowed in order dated 22.3.2021 in Petition No. 405/MP/2021 was subject to the conditions to be satisfied by the Petitioner.

5. The learned counsel for the Respondent MPPMCL adopted the above submissions of the learned counsel for the Respondent GRIDCO. He, however, submitted that the filing of the present petition on the ground that the claims in respective tariff petitions were pending due to covid-19 pandemic, is not acceptable. The learned counsel also submitted that the 'power to relax' cannot be exercised to mitigate the hardship faced by the Petitioner. He further submitted that since the 2019 Tariff Regulations do not contain any provision for recovery of fly ash transportation expenses, the prayer of the Petitioner for relaxation, amounts to seeking 'mandamus'.

6. The learned counsel for the Respondent Delhi Discoms (BRPL & BYPL) adopted the submissions made by the Respondents above. He also referred to the reply and submitted that since the Petitioner was aware of the MOEF&CC Notifications regarding fly ash transportation expenses, it should have sought for incorporation of a provision for allowing recovery of such expenses, while framing the 2019 Tariff Regulations. Having not done so, the prayer of the Petitioner seeking relaxation of the regulations, amounts to amendment of the regulations, which is not permissible. The learned counsel further submitted that the relief sought by the Petitioner does not fall within the ambit of Regulation 3(10) of the 2019 Tariff Regulations. He added that the MoEF&CC Notification dated 31.12.2021 only extended the timeline for carrying out obligations towards fly ash utilization and transportation by Petitioner and therefore, the Petitioner cannot claim any subsequent Notification dated 31.12.2021 to be a Change in Law event, when there has been no material change, qua the responsibility of the Petitioner. The learned counsel sought permission of the Commission, to file its written submissions, in the matter.

7. The learned counsel for the Respondents Karnataka Escoms adopted the submissions made by the learned counsel for the Respondents as above. She however added that the power to relax/power to removal of difficulty can only be exercised in case of difficulty in implementation of the regulations and not due to difficulties faced by the Petitioner. The learned counsel also submitted that while the Petitioner in its tariff petition (related to Kudgi STPS) has sought recovery of fly ash transportation expenses on a quarterly basis, it has sought recovery of the same expenses, on a monthly basis, in the present petition. The learned counsel sought permission of the Commission, to file its written submissions, in the matter.



8. The learned counsel for Respondent TANGEDCO adopted the submissions of the learned counsel for the Respondents as above. He, however, submitted the following:

(a) The petition is bereft of particulars which are required to be furnished in compliance to the MoEF&CC Notifications dated 25.1.2016, 22.4.2021 and 31.12.2021. The MOP, GOI notification dated 22.2.2022 has clearly formulated the procedure to be adopted by generating stations in fixing and claiming of ash transportation charges. Hence, the Petitioner is required to certify that the procedure mentioned in the said notification was followed along with details.

(b) No documents have been submitted to show that transparent competitive bidding procedure was conducted by the Petitioner and there are no details of the scheduled rates of the respective State Governments, as applicable for transportation of fly ash. No details of the actual additional expenditure incurred on ash transportation after 25.1.2016, duly certified by auditors, have been submitted. No document has been placed on record to show that the details of the revenue generated from fly ash sales are maintained in a separate account as per the MoEF & CC Notification.

(c) While the Petitioner has relied on the order dated 5.11.2018 in Petition No. 172/MP/2016, to contend that the MOEF &CC notification is a change in law, for grant of relief in the present case, it has not complied with the conditions laid down in the said order.

(d) The Petitioner is under an obligation to submit station-wise claims, as each generating station will be different in respect to (i) the date of commercial operation (ii) variation in the technology used (iii) the quality of coal consumed and the potential of fly ash usage within the plant. Therefore, instead of a generic petition, the claims of the Petitioner may be considered on a case to case basis, for each generating station, separately.

9. The learned counsel for the Respondent MSEDCL and Respondent Bihar Discoms adopted the submissions made by the learned counsel for Respondents above and also prayed for liberty to file their written submissions.

10. In response to the above, the learned counsel for the Petitioner clarified as under:

(a) The claim of the Petitioner for recovery of fly ash transportation expenses in Petition No. 172/MP/2016 was based on estimates, pursuant to the MoEF&CC notification dated 25.1.2016. However, since the order in the said petition was passed on 5.11.2018 (i.e. fag end of 2018-19), the Commission had granted liberty to the Petitioner to approach the Commission with details, at the time of truing up of tariff. However, in the present case, the Petitioner has sought the reimbursement of the fly ash transportation expenses incurred for the period 2019-20, 2020-21 and for recovery of the balance amount on monthly basis.



(b) The Petitioner has complied with the directions contained in order dated 5.11.2018 in Petition No. 172/MP/2016 and tariff petitions for 2014-19 has been disposed of accordingly. The prayer for recovery of the fly ash transportation expenses for the 2019-24 tariff period is subject to truing-up based on prudence check of the information filed by the Petitioner.

(c) The Hon'ble High Court of Rajasthan High Court in *Birla Cement Works & anr. Vs State of Rajasthan & Ors* is has decided that if subsequent cause of action gives rise to new reliefs or for additional reliefs, the filing of subsequent proceedings in respect of subsequent cause of action claiming similar reliefs, along with additional reliefs or on additional grounds is not barred. The claim of the Petitioner is therefore admissible.

(d) The Petitioner has complied with all the stipulations contained in the MoEF&CC Notifications, including the MOP notification dated 22.2.2022. If the regulations notified by this Commission do not contain any provision for recovery of such expenses, the Commission in exercise of its regulatory power under Section 79(1)(a) of the Act may grant the relief prayed for in the petition.

(f) As the Petitioner is facing acute financial crunch, the reliefs sought for in the petition may be granted.

(g) The Petitioner may be permitted to file the note of arguments circulated during the hearing.

11. The Commission, after hearing the parties, permitted the Petitioner to upload the note of arguments, if not already done.

12. The Commission also directed the Petitioner to file the following additional information by **22.7.2022**, after serving copy to the Respondents

(a) Station wise and year wise audited details of Ash Utilisation Reserve Fund w.e.f. 3.11.2009 to 25.1.2016 and further till the end of the 2021-22, clearly showing all accruals and drawals from the said fund;

(b) Plant-wise details of income and expenses incurred against each sub head of ash utilisation (including quantities) as reported to CEA from 2019-20 onwards;

(c) Plant-wise detailed calculations for arriving at the amounts claimed for ash transportation giving details as per MOEF&CC Notifications and Commission's directions in order dated 5.11.2018 in Petition No. 172/MP/2016 namely:

- (i) Distance (km);
- (ii) Quantity (MT);
- (iii) End user details (type, project etc);
- (iv) Fly ash cost paid by the end user (if not on free of cost basis);



- (v) Fly ash transportation cost borne by end user (as per MoEFCC notifications);
- (vi) End user certification for the quantity and distance;
- (vii) Mode of transportation (Rail/Road/Others)
- (viii) Details of competitively awarded transportation contract rates, in case of road contracts (per km);
- (ix) Prevailing Schedule of Rates for the respective years in that State etc.

(d) Plant wise plan for improving utilisation of fly ash and reducing cost of transportation of fly ash.

12. The Respondents shall file their replies/written submissions by **2.8.2022**, after serving copy to the Petitioner, who may file its rejoinder/written submissions if any, by **10.8.2022**. Subject to the above, order in the petition was reserved.

By order of the Commission

Sd/-
(B. Sreekumar)
Joint Chief (Law)

